FILED
MAY 22 1953
HAROLD B. WILLEY, Clerk

NO. [redacted]88

IN THE

Supreme Court of the United States

——— Term, 1953

WALTER BRYSON JONES,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN, TEXAS, AND SUPPORTING BRIEF

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TABLE OF CONTENTS

Page

Statement of the Case:

1. The Indictment 2
2. Judgment—Plea Not Guilty 3
3. Defendant's First Application for a Continuance 3
4. Application for Suspended Sentence 5
5. Defendant's Motion for a New Trial 5
6. Order Overruling Motion for a New Trial 9

Jurisdictional Statement 10

The Question Presented 12

Specification of Errors Urged 12

Opinion in the Court Below 13

Motion for a Rehearing 19

Conclusion and Prayer 26

Reply Brief for Writ of Certiorari 27

Opinion 29

Argument and Authorities 32

Conclusion 41

TABLE OF CASES CITED

	Page
20 American Jurisprudence, Sec. 797, p. 669	29
American Law Reports Annotated, 152, page 1202	10
Apodaca vs. State, 146 S.W. (2d) 381	12, 16
Ash vs. State, 141 S.W. (2d) 258	16
Bill of Rights—Art. 1, Sec. 10-Constitution of Texas	12
Bowles, et al., vs. Bourdon, et al., 219 S.W. (2d) 779	29
Boyd vs. United States - 116 U.S. 616	11
Thomas Bram vs. United States—Supreme Court U.S. 568	10, 20
Brown vs. Walker - 161 U.S. 596	11
Burrowes vs. High Com. Court-Bulst, 49 Lord Coke	11
Caller Times Pub. Co. vs. Chandler - 130 S.W. (2d) 853	11
E. R. Coli vs. United States - 131 F. (2d) 354	11
Conn vs. State - 143 S.W. (2d) 1036	12
16 Corpus Juris-Page 566	12
Duncan vs. Magette, 25 Tex. 245	25
Gilham's Case - 2 Moody 194	11
Green vs. State - 88 Ga. 516	11
Greenleaf on Evidence - 15th Ed. 219	10, 20, 32
Halloway vs. State - 175 S.W. (2d) 258	12, 16
Hopt vs. Utah - 110 U.S. 574	11
Hubbard vs. State - 112 P. (2d) 174	11
McKay vs. State - 235 S.W. (2d) 173	16

TABLE OF CASES—Continued

	Page
Pierce vs. United States - 160 U.S. 51	11
Queen vs. Harris - 1 Cox CC 106	11
Reg vs. Drew - 8 Car. & P. 140	11
3 Russell on Crime - 6th Ed. 478-501	10, 23, 37
Sparf vs. United States - 156 U.S. 51	11
Spicer vs. Commonwealth Ky. - 51 S.W. 802	11
State vs. Donato - 148 A. 776	11
State vs. Johnny - 29 Nev. 203 (87 Pac. 3)	12
State vs. Matthews - 66 N.C. 106	11
State vs. Patterson - 73 Mo. 695	11
United States vs. Kallas - District Court, W. D. Washington, S.D. April 30, 1921 272 (F) 742	10, 38
United States of America vs. Jasper White American Law Reports Annotated, 152 Am. Law Reports Annotated, 1202	10, 40
United States Code Annotated, Vol. 1, Art. 1, Ammendment 5, page 102	10
Wharton's Criminal Evidence - 9th Ed. 631	11
Wharton's Criminal Evidence - 10th Ed. Vol. 1, P. 617, Sec. 315	12
Wharton vs. State - 152 S.W. 1082	25
Wigmore on Evidence - Vol. 1, paragraph 856	12
Wilson vs. United States - 162 U.S. 613	11

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WALTER BRYSON JONES,

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VS.

THE STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN, TEXAS, AND SUPPORTING BRIEF

Petitioner, Walter Bryson Jones, pray that a Writ of Certiorari issue to review a judgment of the Court of Criminal Appeals of Texas, which was rendered by said Court on the 3rd day of December, 1952, and which became a final judgment on the 6th day of March, 1953.

STATEMENT OF THE CASE

On the 29th day of October, A.D. 1951, came the Grand Jury for the body of the County of Dallas, a quorum being present and delivered to the Judge of the Criminal Dis-

trict Court No. 2, of Dallas County, Texas, the following bill of endictment, endorsed "A TRUE BILL" and signed by their foreman, W. J. Morris, to-wit:

NO. 511-B

THE STATE OF TEXAS

VS.

WALTER BRYSON JONES

SUBSEQUENT OFFENSE OF DRIVING A MOTOR VEHICLE UPON A PUBLIC HIGHWAY WHILE INTOXICATED

At a regular term of the Criminal District Court begun and holden within and for the County of Dallas and State of Texas, before the Honorable Robert A. Hall, Judge thereof, presiding, which term began on the 7th day of January, A.D. 1952, and which term adjourned on the 5th day of April, A.D. 1952, the following cause came on for trial, to wit:

NO. 511-BA

THE STATE OF TEXAS

VS.

WALTER BRYSON JONES

SUBSEQUENT OFFENSE OF DRIVING A MOTOR VEHICLE UPON A PUBLIC HIGHWAY WHILE INTOXICATED

JUDGMENT—PLEA NOT GUILTY

The judgment reflected in the Minutes of the Criminal District Court, Dallas County, Texas, Vol. 36, Page 392, February 26, 1952, the following, to-wit:

"We, the Jury, find the defendant guilty as charged in the indictment, and assess his punishment at one year, one day in the county jail.

/s/ H. D. Carlton, Foreman

DEFENDANT'S FIRST APPLICATION FOR A CONTINUANCE

Filed February 25, 1952

THE STATE OF TEXAS

VS.

WALTER BRYSON JONES

IN THE CRIMINAL DISTRICT COURT DALLAS COUNTY, TEXAS, JANUARY TERM, 1952

Now comes Walter Bryson Jones, the defendant herein and files this his First Application for a Continuance in this case and in support of such Motion, shows the Court as follows:

1.

That the defendant cannot safely go to trial at this time due to the fact that the Attorney of his choice, James H. Martin, is unable to be present in Court for the full

term of the trial; that said Attorney has scheduled for trial other cases which were set prior to the time this case was set.

That this First Application for a Continuance is not made for the purpose of delay, but that justice may be done in the premises.

Wherefore, defendant prays the Court that this case be passed for a period of two weeks that his Attorney may be present in Court to attend the trial.

/s/ Walter Bryson Jones
Defendant

Subscribed and sworn to by Walter Bryson Jones on this the 25th day of February, A. D. 1952.

BILL SHAW, District Clerk,
Dallas Co., Texas
By /s/ O. A. Myers, Jr., Deputy

February 25, 1952—State files Controverting Affidavit. Motion overruled. Defendant excepts.

/s/ Robert A. Hall, Judge.

Endorsement on Instrument: Filed Febuary 25, 1952. BILL SHAW, DIST. CLERK, DALLAS COUNTY, TEXAS.

/s/ BY: O. A. Myers, Jr., Deputy

APPLICATION FOR SUSPENDED SENTENCE
Filed November 13, 1951

DEFENDANT'S MOTION FOR A NEW TRIAL
Filed February 27, 1952

NO. 511-BA

THE STATE OF TEXAS

VS.

WALTER BRYSON JONES

IN THE CRIMINAL DISTRICT COURT
DALLAS COUNTY, TEXAS
JANUARY TERM, 1952

Now comes the defendant, Walter Bryson Jones, in the above entitled and numbered cause in the Criminal District Court of Dallas County, Texas, and files this his Motion for a New Trial in which he respectfully shows to the Court as follows:

1.

The evidence adduced during the trial and hearing of said cause was insufficient to support the verdict rendered by the jury.

2.

That the Court committed material and harmful error in permitting and allowing State's witness, City Police Officer Garrison to testify concerning an instrument

which was presented to the defendant while he was under arrest seated in the squad car of the police officer, in that it violated Article 5 of the Constitution of the United States which provides "the individual shall not be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." Compel means to urge either by physical force or moral force, a person whose action and assist action and press to the mind or will of an individual encouraging one and furnishing a ground of hope.

3.

The defendant would further show the Court that objection was made which the Court overruled and the defendant says the Court committed material and harmful error in allowing the officer to testify verbally and orally and by and through motions made by his hands concerning an alleged intoximeter, in that the defendant's rights were not protected by the Court by allowing the said testimony to be heard by the jury over the defendant's timely objection, because the so-called intoximeter or parts thereof, which the term intoximeter reflected had been returned to some factory to be refilled. The State should have been required, as the defendant so requested, to produc said intoximeter or parts thereof, as under the rules of evidence they would have been considered the best evidence.

4.

The defendant further respectfully submits to the Court that harmful and material error was committed by overruling of the defendant's objection to the proposition of law that the State was inconsistent in alleging and proving that the defendant was dazed, his pupils dilated and that he was in a state of intoxication and admitted to Officer Garrison that he did not understand or could not read the instrument heretofore referred to and objection, to which the Court allowed to be introduced into evidence.

5.

Defendant further represents to this Honorable Court that harmful and material error was committed by allowing Dr. Mason to testify over the timely objection of the defendant concerning standards set up by, according to his testimony, the National Safety Council and the American Medical Association, in that the objection went to the basis of the proposition of law that the witness, Dr. Mason, didn't participate in the setting of any such standards, but knew of such standards by hearsay. That the Defendant was entitled to have evidence presented and heard by the jury concerning the setting of the standard if one had been set, and as to whether or not the so-called said standard was fair and reasonable, and that experiments had been made and that said standards were set by either of the before named corporations, and that they

were not arbitrary and set with selfish interest and bias, in view of the fact that the National Safety Council was aligned with and associated with insurance companies who are interested in a reduction of automobile accidents to save money for their concerns on premiums paid for coverage, and further that in the City of Dallas, the so-called Citizens Traffic Commission and Crime Commission are aligned with the National Safety Council and are known as local pressure groups which bring pressure upon, not only the Court in the instant case, but on the District Attorney's staff generally to bring about one hundred percent convictions in all driving while intoxicated cases, both misdemeanor and felony.

Wherefore, premises considered, defendant prays that this Honorable Court grant him a new trial herein and restore this case to the active docket of this court.

/s/ Travis Kirk
Attorney for Defendant

ENDORSEMENT OF INSTRUMENT: No. 511-BA. *State of Texas vs. Walter Bryson Jones.* Motion for New Trial. FILED February 27, 1952. BILL SHAW, DISTRICT CLERK, DALLAS COUNTY, TEXAS.

BY: /s/ O. A. Meyers, Jr., Deputy

ORDER OVERRULING MOTION FOR A NEW TRIAL

Minutes of Criminal District Court, Dallas County, Texas

Vol. 36, Page 419

February 27, 1952

NO. 511-BA

THE STATE OF TEXAS

vs.

WALTER BRYSON JONES

IN CRIMINAL DISTRICT COURT, DALLAS COUNTY, TEXAS, JANUARY TERM, A.D. 1952

February 27, 1952

This day came on to be heard the motion of the Defendant, Walter Bryson Jones, to set aside the verdict and judgment herein rendered, and grant him a new trial of this cause; and the State being present in court by her District Attorney, and the Defendant, Walter Bryson Jones, and his counsel, both being present in court in person, and the Court having heard the said motion for a new trial, is of the opinion that same should be refused. It is therefore considered, ordered and adjudged by the Court that the said motion for a new trial herein be and the same is refused and in all things overruled. Whereupon the Defendant, Walter Bryson Jones, in open court, excepted to such judgment and gave notice of an appeal herein to the Court of Criminal Appeals of the State of Texas, which said notice is here now entered of record.

Recognizance on appeal set at $1,500.00. Recognizance Bond made.

/s/ Robert A. Hall
Judge, Criminal District Court,
Dallas County, Texas

JURISDICTIONAL STATEMENT

The jurisdiction of the Court is invoked under United States Code Annotated, Vol. 1, Constitution of the United States, Article 1, Amendment Five (5), United States Code Annotated, Page 102, which provides as follows:

> "That no person shall be compelled in any criminal case to be a witness against himself."

The Judgment of the Court of Criminal Appeals of Texas to be reviewed was entered on the 6th day of March, 1953. The jurisdiction of this Court is sustained by the following cases:

United States vs. Kallas, District Court, W.D. Washington, S.D. April 30, 1921 272 (F) 742;

American Law Reports Annotated, 152, page 1202;

United States of America vs. Jasper White;

Thomas Bram vs. United States — Supreme Court U.S. 568;

Greenleaf on Evidence — 15th Ed. 219;

3 Russell on Crimes — 6th Ed. 478;

Wharton's Criminal Evidence — 9th Ed. 631;

2 Taylor's Evidence — 9th Ed. 874;

Boyd vs. United States — 116 U.S. 616;

Brown vs. Walker — 161 U.S. 596;

Hopt vs. Utah — 110 U.S. 574;

Sparf vs. United States — 156 U.S. 51;

Pierce vs. United States — 160 U.S. 355;

Wilson vs. United States — 162 U.S. 613;

Burrowes vs. High Commission Court — Bulst 49 Lord Coke

Gilham's Case — 2 Moody 194;

Green vs. State — 88 Ga. 516;

State vs. Patterson — 73 Mo. 695;

State vs. Mathews — 66 N.C. 106;

Reg vs. Drew—8 Car. & P. 140;

Queen vs. Harris — 1 Cox CC 106;

Caller Times Pub. Co. vs. Chandler — 130 S.W. (2d) 853;

State vs. Donato — 148 A. 776;

E. R. Coli vs. United States — 131 F. (2d) 354;

Hubbard vs. State — 112 P. (2d) 174;

Spicer vs. Commonwealth Ky. — 51 S.W. 802;

16 Corpus Juris — Page 566;

28 Ruling Case Law — Page 434, Sec. 20;

Bill of Rights — Art. 1, Sec. 10—Constitution of Texas;

Wharton's Criminal Evidence — 10th Ed. Vol. 1 P. 617 Sec. 315;

Apodaca vs. State — 146 S.W. (2d) 381;

Halloway vs. State — 175 S.W. (2d) 258;

State vs. Johnny, 29 Nev. 203 (87 Pac. 3);

Wigmore on Evidence, Vol 1, Paragraph 856;

Conn vs. State, 143 S.W. (2d) 1036.

The Court of Criminal Appeals of Texas is not an intermediate court. It is the court of last resort in Texas in all matters within its jurisdiction. Its judgments are not reviewed by the Texas Supreme Court or by any other Texas court.

THE QUESTION PRESENTED:

Whether petitioner was deprived of rights guaranteed by the 5th Amendment to the Constitution of the United States, does the privilege against self-incrimination apply to the evidence introduced?

SPECIFICATION OF ERRORS URGED

The Court of Criminal Appeals of Texas erred:

1. In its failure to decree that petitioner was deprived of rights guaranteed by the 5th Amendment to the Constitution of the United States.

WALTER BRYSON JONES, *Appellant*

No. 26,072

THE STATE OF TEXAS, *Appellee*

Appeal from Dallas County.

OPINION

Appellant was given a sentence of a year and a day in the county jail, by a jury, upon a charge of driving while intoxicated.

The charge followed a former conviction and proof of such former conviction is without dispute.

The contentions of appellant, and the counter-contentions of the prosecution, present quite an involved record. A lengthy brief in behalf of appellant was filed and this was followed with oral argument. The brief for the state was prepared by the office of the District Attorney, and a representative from that office argued the case orally. We are so impressed with the elementary character of these contentions as to feel that a discussion of many of them is unnecessary. This is true of practically all, with the exception of such bills as complain of the ruling of the court in admitting the evidence as to the scientific conclusion of the amount of alcohol in appellant's blood.

B. C. Garrison, of the Police Department of the City of Dallas, testified that he was trained in the use of an instrument known as the "Intoximeter," with which he took a sample of the breath of appellant soon after his arrest. This was delivered to Dr. Morton F. Mason, a Professor of Pathological Chemistry at the Southwestern Medical School, a branch of the University of Texas; he is also toxicologist for the City of Dallas and Dallas County. Dr. Mason testified that he determined the alcoholic content of the breath in the unit delivered to him by the police department, and that the analysis showed the alcoholic content of the blood was .275 per cent alcohol by weight. He then testified that in his opinion this result showed that the appellant was intoxicated. As a basis for his conclusion he testified, under cross-examination, that the American Medical Association and the National Safety Council adopted standards of sobriety which he, as a scientist, accepts as being correct. He says if the concentration of alochol in the fluid of the party from whom it is taken is greater than .15 per cent he is considered to be under the influence of alcohol. Contrasted with the case before him, in which it showed .275 per cent, he said: "That means that the individual who took this test was unequivocally under the influence of alcohol at the time that the test was given." All questions asked him were strenuously objected to by appellant and this presents one complaint which we feel that we might helpfully discuss in this opinion.

Appellant, either before or while under arrest, it is immaterial which, signed an agreement that this test might be taken. The state relies upon that agreement as authority for making the breath test and the appellant attacks it on the ground that appellant was not competent, at the time, to enter into such agreement. This presents a question which is capable, under some circumstances, of being an absurdity. If appellant was so intoxicated that he did not know what he was doing, his contention in that regard would be an admission of guilt before the court. Such would be a fact which the accused would have to prove. On the other hand, it might appear in some cases that the state is relying on an agreement which the party, according to the state's contention, would not be capable of making. The solution to this perplexity rests in the fact that a person under the influence of intoxicating liquor, as defined by the penal code, need not be so intoxicated as to be incapable of entering into a valid agreement, and yet be sufficiently intoxicated to come within the statute defining driving on a public highway while intoxicated. This court has not held that the state can or cannot force the accused to give a sample of the breath or the urine against his will. The question is not before us in this case.

It is deemed helpful to overlook some of the failures of both the state and the defendant in raising or supporting the questions which have been raised, and this we do because of the frequent misunderstanding about what the

court said in the case of *Apodaca v. State*, 146 S.W. 2d 381. The Apodaca case has been criticised because of subsequent cases apparently in conflict, particularly *Ash v. State*, 141 S.W. 2d 341; *Halloway v. State*, 175 S.W. 2d 258; and *McKay v. State*, 235 S.W. 2d 173.

If either the appellant or the attorney representing the state in the trial of this case had been familiar with the McKay case it would appear that the questions that have troubled them so much in the instant case would come to this court with an entirely different record. A reference to the McKay case, re-affirmed by us at this time, will suffice to eliminate much that would otherwise need to be written. The trial court's rulings in the instant case were in accordance with the holding of this court in the McKay case.

The Apodaca case was quite a different one in that the officers forced the accused to do things, physically, which created evidence against him and was tantamount to forcing him to testify. In the other cases and the instant case the prosecution secured from the accused existing facts which constitute evidence against him. The Apodaca opinion enumerates the tests through which the accused was forced to go, such as walking fast, making sudden returns, stretching his arms out and putting his finger on his nose, *answering questions*, together with having him to void the urine for analysis. In holding this to be reversible error, the very logical opinion overlooked making any distinction between the last named requirement and those

which caused him to perform acts which may be used to support opinions of his condition. The entire evidence was held to be improper. Had there been any point in discussing the difference, in all probability the distinguished Judge Christian, who wrote that opinion, would have followed the reasoning which the court followed in the Ash case, and the others cited. This reasoning could be enlarged upon by discussing fingerprint cases, those in which the accused's shoes are compared to a track made by the party committing a crime, and many other instances in which the mechanics used were merely for the purpose of obtaining proof of existing facts. We have always permitted witnesses to testify that they smelled the breath and it had an odor of alcohol; that they saw him walk and heard him talk, when he did so, and such evidence is considered valuable. The accurancy of such veidence, which of necessity involves the opinions of witnesses, is not comparable to that given by the scientist in this case, provided that scientific conclusion is accepted as true. In the present state of our holdings it is received, as other evidence, before the jury to be passed upon by them as they see fit. Scientific treatises on the subject, particularly a recent publication by Northwestern University, reveal the activities of the investigation made, as enumerated by Dr. Mason, and also several others reaching the same conclusion. Based upon that scientific investigation many of the states have enacted legislation accepting such scientific facts, with the result, as enumer-

ated in the McKay case, that one who has .05 per cent or less by weight of alcohol in the blood is not under the influence of intoxicating liquor; that if he has in excess of that amount but less than .15 per cent no presumption rests one way or the other; that where the test shows .15 per cent or more, by weight of alcohol in his blood, it shall be prima facie proof that the accused was under the influence of intoxicating liquor.

Texas has not passed such a law and this court has not recognized such as established scientific facts, as the legislatures of other states have done. If science has reliably established these standards it would appear to be to the advantage of both the prosecution and defense to have a means of determining the debatable question with an absolutely correct conclusion. Admittedly, to judge the extent of intoxication by smelling the breath may not always be right. The way one talks or walks is admissible but the witness will err in some cases. The amount of alcohol one has taken cannot give positive proof because it is generally accepted as a matter of common knowledge that some can drink a great deal more without becoming intoxicated than another could. The scientific answer to this is that the one who drinks less to become intoxicated absorbs a greater per cent of the alcohol through his digestive system than the one who can drink more. It is stated in the books of science specifically cited in the McKay case that the amount which one actually absorbs in the blood, not the quantity swallowed, is the determining factor.

The contention that Dr. Mason, or Mr. Garrison, should bring the instrument used into court, that the jury may examine it and determine its accuracy, is untenable. Such seems to be the chief contention. The breath was captured and delivered to Dr. Mason. He qualified himself as a witness to determine its alcoholic content, and any objection to this evidence goes to its weight rather than to its admissibility. The jury heard that objection and they passed upon it, as it was proper for them to do.

Other matters considered present no error and the judgment of the trial court is affirmed.

Beauchamp, Judge.

(Delivered December 3, 1952.)

NO. 26,072

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS AT AUSTIN, TEXAS

WALTER BRYSON JONES, *Appellant*

VS.

THE STATE OF TEXAS, *Appellee*

MOTION FOR A REHEARING

Now comes the Appellant, Walter Bryson Jones, and files this Motion for a Rehearing in the above entitled

and numbered cause and respectfully states to the Honorable Court the following:

1.

That this Honorable Court in the written opinion of Judge Beauchamp errored in not following the law in the question raised by Appellant in his Motion for a New Trial and on appeal same being as follows:

> "That reversible error was committed by the Trial Court in permitting and allowing State's witness Garrison to testify concerning an instrument which was presented to Appellant while under arrest, together with a conversation, in that it violated Article 5 (five) of the Constitution of the United States, which provides, 'The individual shall not be compelled in any criminal case to be a witness against himself.' "

The principle on this subject is stated in *Greenleaf on Evidence* in a note to Paragraph 219, "The rule excludes, not only direct confessions, but any other declarations tending to implicate the prisoner in the crime charged".

In *Bram vs. United States Supreme Court*, U.S. 168 568, that Honorable Court recited the Maxim Nemo Tenetur Seipsam Accusare as having its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power. If an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions

put to him may assume an inquisitorial character, the temptation to press unduly made the system so odious as to give rise to a demand for its total abolition.

The Human Mind, under the pressure of calamity is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or truth, as different agitations prevail. This instrument, therefore, which was obtained from the Appellant, either by flattery of hope, or by impression of fear, however slightly the emotions may be implanted, is not admissable evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.

Looking at the doctrine as thus established, it would seem plainly to be decucible that as a principle from which, under the law of nature, it was held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes. As the *facts* by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, but by the resultant effect upon the mind, that is, fear or hope, so that, however diverse the facts might be, the test would be ascertained by the condition of the mind which causes ordinarily operate to create the well-settled rule in England at the time of the adoption of the Constitution and the Fifth Amendment, and of the intimate knowledge had by the framers of the principles of Civil Liberty which had become a part of the

Common Law, aptly explains the conciseness of the language of the Amendment.

It is manifest that if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it can not, in justice, be said that the mind of one who is held in custody under suspicion of having committed a crime would not be impelled to say something, but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply he would be benefited thereby. And these self-evident deductions are greatly strengthened by considering the place whereby the statements were made and the conduct of the police officer toward the accused.

The hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the *impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place.* Thus viewed, the weight to be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment as arriving from making a statement.

As said in the passage from *Russell on Crimes*, "The law can not measure the force or the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

The Appellant in this Motion for Rehearing refers to the Opinion written affirming the lower Court wherein on pages two (2) and three (3) the Honorable Court states, "The Appellant attacks the agreement on the ground that Appellant was not competent, at the time, to enter into such agreement. This Court has not held that the State can or can not force the accused to give a sample of the breach against his will. The question is not before us in this case."

The appellant, through his unlearned and inexperienced lawyer, has humbly tried in his Motion for a New Trial and his Brief and now again attempts to present to this learned body that the admission of Officer Garrison's testimony concerning the instrument, conversation and taking of the breath was a violation of his Constitutional Rights as hereinbefore restated to this Honorable Court and that is if the Trial Court had followed the law and held the instrument inadmissable, the State could not have under the law as restated in this Motion for a New Trial as laid down by the Supreme Court of the United States it would be compelling the Appellant to give evidence against himself.

The Appellant continues to bring to this Honorable Court's attention that the objection made and the law given herein does present to this Honorable Court the question that the State forced the accused to give a sample of his breath.

The Opinion given in this case refers to "Finger-Print, the taking of moulds of shoe prints, etc., which are admissable evidence as mechanics used merely for the purpose of obtaining proof of existing facts, evidence of smelled breath, order of alcohol, see him walk, talk, etc." The Appellant concedes that what Officer Garrison saw, what the Appelant did in acts, is one thing, but the taking advantage of the Appellant while under arrest and as is cited in the law in the Bram case is something else, and the Record reflects that Officer Garrison testified that Appellant could not read and did not understand what the Officer told him, but he got him to sign it, anyway, so he could take his breath so he could testify what the alcohol content of his breath was.

The Opinion recites the Apodaca case and its ramifications of forcing the Appellant to answer questions, stretch his arms, etc., and on page three (3) states, "In holding this reversible error, the very logical opinion overlooked making any distinction between the last named requirement and those which caused him to perform acts which may be used to support opinions of his condition. The entire evidence was held to be improper." The Appellant contends that the act of signing the instrument par-

allels and should be given the same interpretation and cited the Apodaca case in his brief as support of that contention.

The Opinion on page three (3) further states, "The instant case the prosecution secured from the accused existing facts which constituted evidence against him." Here again the Appellant contends that this Honorable Court overlooked the law because the prosecution did not secure existing facts when they secured the instrument, they wrongfully took from him the signature on the instrument and then used it against him as evidence to get his breath so that they could testify that it contained alcohol.

Appellant again refers this Honorable Court to Judge P. J. Davidson, cited in *Wharton vs. State*, 152 S.W. 1082:

> "Appellant may have been guilty of this matter, but that ought not to matter, if the question presented to this court show error as prevented a fair anl legal trial, for in such cases it is the duty of this court as I understand the duty of appellant courts, to award him another trial that he may be tried under the rules of law. It is the only way that I have been taught that a legal trial can be had or that legal justice can be obtained. I do not believe that appellant has had such a trial as is demanded by law. He has invoked the rules of law, in my judgment but in vain."

Texas' Greatest Jurist, "Judge Roberts", in the case of *Duncan vs. Magette*, 25 Tex. 245, said:

"A FREQUENT RECURRENCE TO THE FIRST PRINCIPLES IS ABSOLUTELY NECESSARY IN ORDER TO KEEP PRECEDENTS WITHIN THE REASON OF THE LAW."

"Justice is the virgin Gold of the mines that passes for its intrinsic worth in every case, but is subject to a varying value to the scales through which it passes."

"A sense of justice, however, must and should have an important influence upon every well-organized mind in the adjudication of cases. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It can not be lost sight of. In this it is like the polar star that guides the voyager, although it might not stand over the port of destination."

CONCLUSION AND PRAYER

Because of the errors herein assigned, it is very respectfully urged that the judgment and opinion rendered by this Honorable Court in this case on December 3, 1952, be in all things reversed and the cause be remanded to the Court below for a new trial.

Very respectfully submitted,

.....

TRAVIS KIRK
Attorney for Appellant
101½ N. Lancaster
Dallas, Texas

NO. ——

IN THE

Supreme Court of the United States

——— Term, 1953

WALTER BRYSON JONES,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

REPLY BRIEF FOR WRIT OF CERTIORARI

The Appellant respectfully submits this second matter to this Honorable Court in this Motion for Rehearing which again directs the Court's attention to Appellant's Motion for a New Trial and the Third Proposition of Law filed in the brief, same being as follows:

> "That the Court committed material error which was harmful to the Defendant by allowing Dr. Mason, not a Licensed M. D., to testify over the timely objection of the Defendant concerning certain standards set up by the National Safety Council and the American Medical Association. In that the objection went to the basis of the proposition of law that the witness,

> Dr. Mason, didn't participate in the setting of the Standards, but only knew of such Standards by hearsay."

In the Honorable Court's Opinion ,on page two it was said:

> "He then testified that in his opinion this result showed that the Appellant was intoxicated. As a basis for his conclusion he testified, under cross-examination, that the American Medical Association and the National Safety Council adopted Standards of sobriety which he, as a scientist, accepts as correct. All questions asked him were strenuously objected to by Appellant, and this presents one complaint which we feel that we might helpfully discuss in this opinion."

The Court's Opinion states, "IF SCIENCE HAS ESTABLISHED THESE STANDARDS . . . ."

The Appellant begs to show the Court that if Dr. Mason had been qualified by the State on the proposition that he had been a member of any bodies, especially one of these bodies, and had participated in the experiments and was himself familiar with these experiments and was testifying from his personal experiences as to the Standards he could have testified and again the Appellant begs the Court to differentiate between the opinion testimony as to the result from his test of the breath and his giving as the basis for opinion testimony what someone did, said and he knew only by hearsay and what someone told him. Nowhere does the testimony reflect that he knew anything

about the standards except that these bodies set them and that he accepted them.

No. 26, 072

WALTER BRYSON JONES, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Dallas County

OPINION

Appellant's motion for rehearing complains of that portion of our original opinion in which we discuss Dr. Mason's testimony as follows:

> "As a basis for his conclusion he testified, under cross-examination, that the American Medical Association and the National Safety Council adopted standards of sobriety which he, as a scientist, accepts as being correct. He says if the concentration of alcohol in the fluid of the party from whom it is taken is greater than .15 per cent he is considered to be under the influence of alcohol.

This, he says, is comparable to the use of medical textbooks as evidence, and he quotes many authorities, including our own Supreme Court, as condemning the same. *Bowles et al v. Bourdon et al*, 219 S.W. 2d 779.

We do not so view the testimony. In 20 Am. Juris., Sec. 797, p. 669, we find the following:

"Experts, in giving opinion testimony may, however, refer to scientific authorities and state the result thereof. Such reference is not deemed an introduction of the books in evidence but as a corroboration of their own opinions."

This, we think, disposes of appellant's contention.

Not as authority for this holding, but for the information of the Legislature, we quote from the Journal of the American Medical Association, Vol. 129, No. 9, on page 631, the following:

"Since 1937 the committee created by the House (House of Delegates of the American Medical Association) to study problems of motor vehicle accidents has studied carefully the relation of the action of alcohol to traffic accidents. In this study it has collaborated closely with the Committee on Tests for Intoxication of the National Safety Council. It has on several occasions recommended definite borderline limits for alcoholic influence in terms of amount of alcohol in the suspected drunken driver, and these limits have been approved by the House. In order to promote uniformity in state legislation in this field, the National Safety Council, through its Committee on Tests for Intoxication and with the active collaboration of the Bureau, has formulated a draft of a uniform bill which embodies the borderline limits approved by the House . . . The draft, in form, is an amendment to section 54, Act V, of the Uniform Vehicle Code, and reads (in part) as follows:

"Sec. 54 . . .

(b) In any criminal prosecution for a violation of subdivision (a) of this section relating to driving a

vehicle while under the influence of intoxicating liquor, the amount of alcohol n the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance shall give rise to the following presumptions:

"1. If there was at that time five-hundredths per cent or less by weight of alcohol in the defendant's blood, it shall be prosumed that the dfndant was not under the influence of intoxicating liquor;

"2. If there was at that time in excess of five-hunredths per cent but less than fifteen-hundredths per cent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant;

"3. If there was at that time fifteen-hundredths per cent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;

"4. The foregoing provisions of this subdivision shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor."

The Legislatures of the states of New York and Wisconsin have in recent years enacted statutes adopting the presumptions set out above.

Remaining convinced that we properly disposed of this case in our original opinion herein, the appellant's motion for rehearing is overruled.

Morrison, Judge

(Delivered January 28, 1953)

ARGUMENT AND AUTHORITIES

In *3 Russell on Crimes*, 6th ed. 478, it is stated as follows:

> "But a confession in order to be admissable must be free and voluntary; that is, must not be extracted by any sort of threats or violence nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law can not measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

The principle on the subject is thus stated in a note to Paragraph 219 of *Greenleaf on Evidence*:

> "The rule excludes, not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess."

The maxim Nemo tenetur seipsum accusare had its origin in a protest against the inquisitorial and mani-

festly unjust methods of interrogating accused persons, which has long obtained in the continental system, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of a prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, made the system so odious as to give rise to a demand for its total abolition.

The human mind under the pressure of calamity is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impression of fear, however slightly the emotions may be implanted, is not admissable evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.

Looking at the doctrine as thus established, it would seem plainly to be decucible that as a principle from which, under the law of nature, it was held that one

accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which complsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by the resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create the well-settled nature of the rule in England at the time of the adoption of the Constitution and of the Fifth Amendment, and of the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explains the conciseness of the language of that amendment.

In approaching the adjudicated cases for the purpose of endeavoring to deduce from them in a case presented, what quantum of proof is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is, that all the decided cases necessarily rest upon the state of facts which existed in

the particular case, and therefore furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar condition of fact.

Indeed, the embarrassment which comes from the varying state of fact is considered in the decided cases, has given rise to the statement that there was no general rule of law by which the admissability of a confession could be determined, but that the Courts had left the rule to be evolved from the facts of each particular case.

And, again, it has been said that so great was the perplexity resulting from an attempt to reconcile the authorities that it was manifest that not only must each case solely depend upon its own facts, but that even the legal rule to be applied was involved in obscurity and confusion.

The rule is not that in order to render a statement admissable the proof must be adequate to establish that the particular communications contained in a statement was voluntary, but it must be sufficient to establish that the making of the statement was voluntary; that is to say that from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent.

The English courts were frequently called upon to determine whether the language used by a magistrate when about to take the examination of one accused tended to induce in the mind of the latter such hope or fear as to lead to involuntary mental action. Although the accused had been cautioned not to say anything to prejudice himself, the further statement, in substance, by the magistrate or his cleark, that what the prisoner said would be taken down, and "would" be used for or against him at his trial, was held by Coleridge, Judge, to be equivalent to saying that what the prisoner chose to say might be used in his favor at the trial, and to be a direct inducement to make a confession, RENDERING THE STATEMENT INCOMPETENT AS EVIDENCE. Like rulings were also made in cases where similar assurance that the statement of the prisoner would be used were made to him by a police officer.

In cases where statements of one accused had been made to others than the magistrate upon an examination, differences of opinion arose as to whether a confession made to a person not in a position of authority over the accused was admissable in evidence after an inducement had been held out to the prisoner by such person. It was finally settled, however, that the effect of inducements must be confined to those made by persons in authority.

There can be no question, however, that a police officer, actually or constructively in charge of one in custody on

a suspicion of having committed crime, is a person of authority within the rule, and as this is so well established, we will not consider the adjudicated cases in order to demonstrate it, but to content ourselves with a reference to the statement made in *Russell on Crimes*, 3rd Volume, at Page 501.

It is proved affirmatively that the confession was free and voluntary, that is, was it preceded by any inducement to make a statement to be held by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissable.

On the broad, plain ground that it was not proved satisfactorily that the confession was not free and voluntary, the confession ought not to have been received.

Whilst there is no question that a police officer having a prisoner in custody is a person in authority, and therefore any inducement by him offered, calculated to operate upon the mind of the prisoner, would render a confession of a consequence thereof inadmissable, although the fact of his questioning became an important element in determining whether the inducement resulted from the language by him used.

It is certain that where a confession is elicited by the questions of a policeman, the facts of its having been so obtained it is conceded mainly by an important element

indetermining whether the answers of the prisoner were voluntary.

From this review it clearly appears that the rule as to confessions by an accused (leaving out of consideration the rule followed in England restricting the effect of inducements according as such inducements were or were not held out by persons in authority) is in England today what it was prior to and at the adoption of the Fifth Amendment, and that whilst all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless all the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases.

In the case of *United States vs. Kallas*, 272 Federal Reporter, 742, the court refers to 81 Federal 830, *U. S. vs. Bell* and states, "He was not warned of his right to remain silent, nor that any statement he made might be used in evidence against him. The court concludes that the protection afforded by the Fifth Amendment, even where the prosecution is for perjury in the statement itself, rendered such evidence inadmissable."

> Probably he never heard of this constitutional provision, and his long-established right to stand silent, and refuse to answer, when his answers might not only involve him in criminal prosecution, but submit him to the pains and penalties of yielding to the hu-

man temptation to sustain his wrongdoing, or to be in any way subjected to material losses and penalties. Now, it is conceded that this examiner did not warn him of his right to be silent, as it is the duty of all officers to do when about to examine one who may be incriminated by his testimony. It may be conceded that there is no imperative obligation on the judge or other magistrate or OFFICER who commences the examination of who is involved by danger of criminal pursuit to warn the citizen of that danger, in the sense that, if he neglects or refuses to do so, the citizen can complain against the magistrate; and it may be conceded that it is a personal privilege to stand silent, that may be waived, and, further, that it is the duty of the citizen himself to claim his privilege whenever it is in danger. But this is all beside the queston. It is the common practice and the recognized course of procedure that the judge or magistrate or other official does warn the proposed witness of his danger and his privilege to avoid it by silence, and it was not done in this case.

On page 752 of the heretofore mentioned case of *United States vs. Kallas*, the court in its opinion stated as follows:

The questioning by or with the consent of his official captor of a prisoner is essentially inquisitorial in its nature. He is confined, and perforce must submit to such questions. True, he may remain silent; but he cannot excape the questions, as he might if he were physically free. The actual existence of duress, arising from the fact that he is confined and cannot escape his questioner, is sufficient, and requires that he be advised that he is not compelled to answer, and, if he does so, his answers will be used against him.

> Fairness can require no less. So much at least is guaranteed by the Fifth Amendment.
>
> While it may be that many know of their rights, and, even when in prison, have the will and courage to stand upon them, there certainly are others who do not. The safer and better course to pursue is to require evidence that each and every prisoner has been advised of his right to remain silent, and warned of the danger in speaking, before any statement made is admitted, rather than enter upon a more or less speculative inquiry as to whether the statements of accused were made voluntarily or not. Whether it arises from zeal or prejudice, born of their calling, the nature of the accusation or situation, or all of these and other things, it does not matter—consciously or unconsciously, upon such an inquisition, the police, and officers having similar duties, often array themselves against the accused.

In the case of *United States of America vs. Jasper White*, reported in American Law Reports Annotated, 152 American Law Reports Annotated, 1202, this Honorable Court stated, in an opinion rendered by Justice Murphy, in Headnote 2, as follows:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the accused individual or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physi-

cal torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence.

CONCLUSION

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the Court of Criminal Appeals of Texas, to the end that this cause may be reviewed and determined by this Court; and that the judgment of said Court of Criminal Appeals be reversed by this Court, and for such other and further relief as the Court may seem proper.

Respectfully submitted,

.....

JUL 13 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. [redacted]38 !

WALTER BRYSON JONES,
Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT MATTER INDEX

	Page
Preliminary Statement	1
Statement of the case	3
Respondent's Counter Points 1, 2 and 3	3
Respondent's Counter Point 1 (Restated)	4
Exemption from compulsory self-incrimination in the State Courts is not secured by the 5th Amendment or any part of the Federal Constitution.	
Argument and Authorities	4
Respondent's Counter Point 2 (Restated)	9
Petitioner was not deprived of his constitutional rights in that the constitutional guarantee contained in the 5th Amendment against self-incrimination applies only to testimonial evidence elicited from the defendant, and not to his body, nor substance taken therefrom, as evidence.	
Argument and Authorities	9
Respondent's Counter Point 3 (Restated)	22
The rule against self-incrimination is for protection of the individual and hence may be waived by him either by direct action or failure to act and the defendant waived such right in this case.	
Argument and Auhtorities	22
Conclusion	27
Appendix	28

INDEX OF AUTHORITIES

Cases:	Page
Adamson v. California, 332 U.S. 46-53 (1946)	8
Apodaca v. State, 176 S.W. 2d 381 (1940)	18
Ash v. State, 141 S.W. 2d 341 (Tex. Crim. App. 1940)	18
Baer v. U. S., 249 U.S. 50 (1919)	11
Black v. People, 240 P. 2d 512, 343 U.S. 978 (Col. Sup. Ct., 1951)	12
Bram v. U. S., 168 U.S. 532	20
Commonwealth v. Statti, 73 A. 2d 688 (Sup. Ct. Penn., 1950)	18
Davis v. State, 57 A. 2d 289 (Ct. App. Maryland, 1948)	18
Duncan v. Magette, 25 Tex. 245	21
Fletcher v. U. S., 49 A. 2d 88 (Mun. Ct. App., D.C., 1946)	17
Holloway v. State, 175 S.W. 2d 258 (1943)	26
Holt v. United States, 218 U.S. 246	11
Jensen v. U. S., 151 F. 2d 512 (1945)	17
McFarland v. United States, 150 F. 2d 593	14
McKay v. State, 235 S.W. 2d 173 (Tex. Crim. App., 1950)	19
People v. One 1941 Mercury Sedan, 168 P. 2d 443 (Cal. Ct. App., 1946)	17
People v. Trujillo, 194 P. 2d 681 (1948)	14
People v. Tucker, 198 P. 2d 941 (Cal. Ct. App.)	17
Polk v. Connecticut, 302 U.S. 319 (1937)	8
Skidmore v. State, 92 P. 2d 979 (Sup. Ct. Nevada, 1939)	17
Slaughter House cases, 16 Wall. 36	6
Snyder v. Massachusetts, 291 U.S. 97 (1933)	7
State v. Alexander, 7 N.S. 585 (1951)	12

	Page
State v. Ayres, 211 P. 2d 142 (Sup. Ct. Idaho, 1949)	17
State v. Cram, 160 P. 2d 283 (Sup. Ct. Oregon, 1945)	16
State v. Nutt, 65 N.E. 2d 675 (Ohio Ct. App., 1946)	18
State v. Sturtevant, 70 A. 2d 909 (Sup. Ct. New Hamp., 1950)	18
Swingle v. U. S., 151 F. 2d 512 (1945)	17
Twining v. New Jersey, 211 U.S. 78	5
United States v. Bell, 81 Fed. 830	27
United States v. Jasper White, 322 U.S. 694 (1944)	21
United States v. Kallas, 272 Fed. Rep. 742	27
United States v. Shaw, 33 F. Supp. 531 (1940)	23
Wharton v. State, 152 S.W. 1082	20
Constitutional Provisions:	
United States Code Annotated, Constitution, Art. 5 Appendix	28
Texts and Secondary Authorities:	
American Jurisprudence, Vol. 14, p. 869, Vol. 20 (Evidence) § 876	16
127 A.L.R. 2d 1408-1409	9
127 A.L.R. 1513	16
159 A.L.R. 217, 218, 220	16
25 A.L.R. 2d 1407	16
Corpus Juris Secundum, Vol. 22, p. 998 (and pocket part)	9
Corpus Juris Secundum, Vol. 22 (Crim. Law), § 649-651	16
Wigmore on Evidence, Vol. VIII, 3rd Ed., § 2263	9
Wigmore on Evidence, Vol. VIII, 3rd Ed., § 2275	23

IN THE

Supreme Court of the United States

No. 824

WALTER BRYSON JONES,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, Walter Bryson Jones, was charged by indictment (R. 3-4) and convicted of a subsequent offense of driving a motor vehicle while intoxicated upon a public highway, the second offense being a felony in the State of Texas. His punishment was assessed at one year and one day confinement in the Dallas County Jail, Dallas County, Texas. (R. 21)

On the trial, the State, over objection of the defendant, was allowed to introduce the testimony of officer B. C. Garrison to the effect that he (officer Garrison) was called to the scene of the auto accident here involved and at that time observed the defendant walk and talk and observed his general ap-

pearance and that in his opinion the defendant was very intoxicated. Officer Garrison was allowed to testify that he asked defendant if he wanted to take a test to determine whether or not he was intoxicated and if he would sign a prepared statement voluntarily subjecting himself to such test. The Officer testified that he read the statement to defendant, that he warned him of his rights not to have to make any statement or take any test at all, and that it could be used against him on trial. Garrison also testified that the defendant said that he understood the statement and did sign it in the presence of the officer. (R 139) The signed statement (R 141) was offered in evidence. The defendant was given the intoximeter test wherein he blew his breath into a balloon which breath was given to Dr. Morton F. Mason for analysis to determine whether or not defendant was intoxicated. Dr. Mason testified that the alcoholic content of the defendant's blood was .275 per cent alcohol by weight. He then testified that in his opinion this result showed that the Appellant was intoxicated. Defendant made timely objection to all of the above on the basis that it violated defendant's privilege against self-incrimination under the 5th Amendment of the Constitution of the United States.

Defendant filed his Motion for a New Trial (R 17) in which he contended, among other things, that the Court committed material and harmful error in permitting testimony as to the circumstances surrounding the waiver which the Defendant signed, in permitting testimony concerning the intoximeter test which Defendant voluntarily took, and in allow-

ing testimony as to the results of such test. Defendant's Motion for New Trial was overruled and judgment entered, from which ruling the Defendant appealed to the Court of Criminal Appeals of Texas. Said Court of Criminal Appeals affirmed the conviction below (R 221) and denied Defendant's First and Second Motions for Rehearing (R 227-240).

STATEMENT OF THE CASE

The crux of Petitioner's objections in his application for writ of certiorari is contained in one basic contention.

(1) That Defendant was deprived rights guaranteed him by the privilege against self incrimination contained in the 5th Amendment to the Constitution of the United States by the admission of evidence concerning the intoximeter test and the results thereof.

Petitioner raises no question concerning due process of law or any other constitutional guarantee on this appeal.

RESPONDENT'S COUNTER POINTS

1. Exemption from compulsory self-incrimination in the state courts is not secured by the 5th amendment or any part of the Federal Constitution.

2. Petitioner was not deprived of his constitutional rights in that the constitutional guarantee contained in the 5th Amendment against self-incrimination applies only to testimonial evidence

elicited from the Defendant, and not to his body, nor substance taken therefrom, as evidence.

3. The rule against self-incrimination is for the protection of the individual and hence may be waived by him either by direct action or failure to act and the Defendant waived such right in this case.

RESPONDENT'S COUNTER POINT ONE
(Restated)

Exemption from compulsory self-incrimination in the state courts is not secured by the 5th Amendment or any part of the Federal Constitution.

Argument and Authorities

Many courts have confused the privilege against self-incrimination, the admissibility of evidence illegally secured, (illegal search and seizure) and violation of accused's property rights under the due process clause of the 14th Amendment.

The only question raised on the appeal and the only problem here involved, however, is the problem of whether accused's rights against self-incrimination have been violated under the 5th Amendment. He raises no question, and indeed there is none, concerning his rights under the Due Process clause of the 14th Amendment of the Constitution. We are confined strictly, therefore, to questions involved under the 5th Amendment as Petitioner himself has limited this appeal to such, on page 12 of his brief. He raises no question in this court of rights under the Constitution of the State of Texas.

The proposition that the exemption from compul-

sory self-incrimination in the state courts is not secured by any part of the Federal Constitution, has become well settled in our law. The interpretation which the state courts place on whatever guarantees they offer an accused; that is, whether they include the extraction of real physical evidence from him, within their guarantee against self-incrimination, is not controlled by the 5th Amendment of the United States Constitution. It appears definite from the cases and especially from the excellent and authoritative opinion of Mr. Justice Moody in the case of *Twining v. New Jersey*, 211 U.S. 78, that, if fundamental in any sense, the privilege against self-incrimination is not fundamental in due process of law nor an essential part of it and is therefore not included within the protection granted by the due process clause of the 14th Amendment and therefore not applicable to the states.

We consider the above proposition so well settled that we deem it unnecessary to go into a lengthy discussion of the cases, but will limit ourselves to a brief discussion of the most important opinions.

In *Twining v. State of New Jersey*, discussing the privilege against self-incrimination, the Court said:

> "The privilege was not included in the Federal Constitution as originally adopted, but was placed in one of the ten Amendments which were recommended to the States by the First Congress, and by them adopted. Since then all the states of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their Constitutions except the States of Iowa and New Jersey . . . It

> is obvious from this short statement that it has been supposed by the states that, so far as the state courts are concerned, the privilege has its origin in the Constitution and laws of the states, and that persons appealing to it must look to the state for their protection. . . . Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. . . . We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. . . . The inference is irresistable that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in the due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried."

The Court here held that there is a citizenship of the United States and a citizenship of the State which are distinct from each other, *Slaughter House Cases*, 16 Wall. 36; and privileges and immunities, although fundamental, which do not arise out of the nature and character of the National Government, or are not specifically protected by the Federal Constitution, are attributes of state, and not National, citizenship. That the first eight Amendments are restrictive only of National action, and while the Fourteenth Amendment restrained and limited state

action it did not take up and protect citizens of the state from action by the states as to all matters enumerated in the first eight Amendments. That exemption from compulsory self-incrimination did not form part of the "law of the land" prior to the separation of the colonies from the mother-country, nor is it one of the fundamental rights, immunities and privileges of citizens of the United States, or an element of due process of law, within the meaning of the Federal Constitution or the Fourteenth Amendment thereto. And that the fact that exemption from compulsory self-incrimination is specifically enumerated in the guarantees of the Fifth Amendment tends to show that it was, and is to be regarded as a separate right and not as an element of due process of law.

The Court then concluded:

> "The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution."

For purposes of brevity, we will not go into a discussion of the other cases on the subject except to state that the *Twinning* case represents the law as it is today and cite a few late cases in point, as follows:

Snyder v. Massachusetts, 291 U.S. 97 (1933):

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accord-

ance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

"The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State."

Polk v. Connecticut, 302 U.S. 319 (1937):

"The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it."

Adamson v. California, 332 U.S. 46-53 (1946):

"It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power. We reaffirm the conclusion of the *Twining and Polk* cases that protection against self-incrimination is not a privilege or immunity of national citizenship."

RESPONDENT'S COUNTER POINT TWO
(Restated)

Petitioner was not deprived of his constitutional rights in that the constitutional guarantee contained in the Fifth Amendment against self-incrimination applies only to "testimonial evidence elicited from the defendant, and not to his body, nor substance taken therefrom, as evidence."

Argument and Authorities

The privilege against self-incrimination is limited to protection against testimonial compulsion; it protects the accused from the process of extracting from his own lips against his will an admission of guilt but it does not extend to the exclusion of his body or substance taken therefrom as evidence against him when such evidence may be relevant and material.

There is a sharp line of distinction between the cases where Defendant is compelled to give testimonial evidence against himself in the form of answering questions or producing papers which will tend to incriminate him and the cases involving the compulsory production or surrender of real or objective evidence. (See annotation in 127 A.L.R. 2d 1408-1409, 22 *Corpus Juris Secundum* 998, and pocket part.)

The proposition is aptly set out in *Wigmore on Evidence*, Vol. VIII, 3rd Ed. § 2263, where he says:

> "Looking back at the history of the privilege and the spirit of the struggle by which its estab-

lishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical court, as opposed through two centuries.

"Such, too, is the inference from the policy of the privilege as a defensible institution; that is to say, it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by force of law.

"Such finally is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence; for if the privilege extended beyond these limits and protected an accused otherwise than in his strict testimonial status,—if, in other words, it created inviolability not only for his physical control of his own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles,—a clear 'reductio ad absurdam'.

"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion.* The one idea is as essential as the other."

As early as 1910 this Honorable Court recognized the above rule in the case of *Holt v. United States*, 218 U.S. 246. Mr. Justice Holmes in that case said:

> "Another objection is based upon an extravagant extension of the 5th Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under duress—and that it should be excluded. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent."

The *Holt case* (cited above) has been cited with approval in *Baer v. U.S.*, 249 U.S. 50 (1919) and many other decisions.

This Honorable Court has denied Certiorari in many cases where bodily substance has been taken from the defendant's body without his consent and evidence based on scientific tests made on such substance was held admissible against the defendant by the highest court of criminal jurisdiction in the State. Prominent among these decisions are the following:

Black v. People, 240 P. 2d 512 (Col. Sup. Ct. 1951), Certiorari denied, 343 U.S. 978.

In this case blood was taken from defendant while he was unconscious after an auto accident and had not consented to the taking of such blood. The court held that evidence based on blood alcohol tests made on his blood was admissible against the defendant to show a state of intoxication. The court here recognized the distinction between real and testimonial evidence and cited *Holt v. U.S.* (discussed above) in support of this decision.

Mr. Chief Justice Jackson recognizes, in this case, that the majority rule recognizes the distinction between a defendant being compelled to testify against himself and evidence concerning his physical condition:

> "A distinction that has been expressed on the philosophical side by Emerson in his essay on 'character' when he said 'what that man is makes so much noise that I cannot hear what he says.' The purpose of the amendment against self incrimination is to prevent a man from being compelled to utter words that will incriminate him, and not to obliterate all evidence of physical facts showing who and in what condition he is."

This case is on all fours with the proposition which we present and on the facts it is practically the same case, differing only in the substance taken from the body of the defendant; in this case the blood of the accused and in our case the breath of the accused.

State v. Alexander, 7 N.S. 585, 83 A. 2d 441 (Cer-

tiorari denied, 343 U.S. 908, 1951), is another State Supreme Court case in which certiorari was denied by this Honorable Court. There again we have a case on all fours with our proposition, a case where evidence based on blood taken from the accused without his consent was admitted against him. In this case the defendant's blood was taken to determine whether or not he had a venereal disease. The Board of Health, after making these tests, turned over to the police authorities an unused portion of the blood, which was analyzed by them to determine the defendant's blood type. Evidence based on this analysis was used against him at his trial to show his blood was of the same type as that found on the handle of the knife in question. In his case the court quotes the following language:

> "The right of the police to fingerprint and photograph is powerfully supported by the argument from convenience and from public interest in permitting the courts to learn the truth of the question at issue. This right is also upheld by custom. . . . We are unable to see where there is any constitutional question involved in this case. There is no substantial difference between obtaining a specimen of blood from an accused and obtaining his fingerprints, or physical property, the possession of which by him is a pertinent question at issue in a felony charge against him. . . . [The question] has arisen in many other jurisdictions, and these have quite uniformly held that the constitutional immunity from self-incrimination does not apply to a compulsory examination to determine the prisoner's physical or mental condition for the purpose of testifying in regard

> thereto. The purpose of the constitutional provision is to prohibit the compulsory oral examination of the prisoner either before or at trial, —to his being required to incriminate himself by speech or the equivalent of speech."

The Court here holds that it is sufficient to recognize that the authorities establish the privilege to be one against testimonial compulsion only, and that it is inapplicable to cases such as this, where the evidence is real rather than testimonial.

Again this court denied certiorari in the case of *People v. Trujillo*, 194 P. 2d 681 (certiorari denied, 335 U.S. 887, 1948). In the Trujillo case fibers were taken from the defendant's clothing without his consent and matched with fibers found near the body of deceased. This evidence was held to be admissible over the objection that it violated his constitutional right against self-incrimination. After recognizing the distinction between real and testimonial evidence and citing many of the above cited authorities the court had this to say:

> "In . . . these cases the doctrine of self-incrimination was limited to testimonial compulsion and there is no legal reason for a further extension of it. . . . It would be difficult to convict one who had committed a crime if, upon his objection, all physical evidence connecting him with the crime would be inadmissible."

Once more this court denied certiorari in the case of *McFarland v. United States*, 150 F. 2d 593 (certiorari denied, 326 U.S. 788, 1945). In this case

blood was discovered on appellant's body after the crime, by an examination to which Appellant, an enlisted man, was forced to submit under a military order. The court here cited *Holt v. U.S.* (cited ante p. 11) to support the proposition that

> "We think the evidence was admissible. 'The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence.' "

In all of the above cited cases some bodily substance or some "real" or physical evidence was taken from the accused without his consent and used against him on trial. In all of the above the highest courts of the state recognized the distinction between real and testimonial evidence and in all of the above certiorari was denied by this court. These cases cannot be distinguished from *Holt v. U.S.* (cited ante p. 11), most of them citing the *Holt* case as authority and none can be distinguished from the case here in question. The taking of a sample of the accused's breath is less invasion of the accused's body than the taking of his blood. If the accused's breath could be extracted from the atmsophere after he had exhaled there would be no question but what it could be used against him in evidence and there is little difference between the accused breathing into an "intoximeter" and using the results against him and his breathing into the atmosphere and using that breath against him.

The question here involved has been presented to

the state courts many times, and almost without exception the admissibility of the evidence was sustained. The vast majority of the courts have rejected arguments almost identical to that which is raised in petitioner's brief in this case. Many, including those cited above, were approved by this court by denial of certiorari. It is recognized that, as the court of last resort for the entire nation, this Honorable Court is not bound by the decisions of inferior courts but it is respectfully submitted that when a particular question has been presented many times before to the highest courts of various states, with the result overwhelmingly the same, the decisions of the state courts are most authoritative.

Of the wealth of state court cases on this subject we will cite only those which seem most important in the interest of brevity. Collections of these cases, however, may be found in American Jurisprudence, Vol. 14, p. 869, Vol. 20 (Evidence) § 876; and sup. 159 A.L.R. 217, 218, 220; Corpus Juris Secundum, Vol. 22 (Crim. Law) § 649-651; 25 A.L.R. 2d 1407; *U.S.C.A. Constitution*, Art. 5 and annotations; 127 *A.L.R.* 1513.

Included among the most interesting and often cited state court cases, holding this type evidence admissible, are the following:

State v. Cram, 160 P. 2d 283 (Sup. Ct. Oregon, 1945), in which the accused's blood was taken while he was unconscious and under arrest after an auto accident. Evidence of the alcohol in his blood was admitted against him on the trial of the case.

> "The defendant was not deprived of any of his constitutional rights by the admission of the

> testimony here in question. He was not compelled to testify against himself. Evidence of the result of the analysis of the blood sample was not his testimony but that of Dr. Beeman, distinct from anything the defendant may have said or done."

People v. One 1941 Mercury Sedan, 168 P. 2d 443 (Calif. Ct. App., 1946), is an often cited case where the court cites many authorities including the *Holt* case and gives a good analysis of the law on this subject. There the accused was suspected of having swallowed marihuana. He was taken to a hospital where a doctor forced a tube through defendant's mouth and down his throat and pumped out the contents of his stomach. Evidence based on analysis of such contents was admitted against the defendant.

> "The overwhelming number of cases hold that the mere fact that the evidence, other than testamonial evidence, had its origin with defendant, even where taken against his will, is no ground for its exclusion."

People v. Tucker, 198 P. 2d 941 (Calif. Ct. App.), blood test to determine alcoholic content taken without defendant's consent; *Swingle v. U.S.*, 151 F. 2d 512 (1945), defendant forced to identify himself but did not identify himself as guilty party; *Jensen v. U.S.*, 151 F. 2d 512 (1945), same; *State v. Ayres*, 211 P. 2d 142 (Sup. Ct. of Idaho, 1949), blood taken from accused while he was unconscious; *Skidmore v. State*, 92 P. 2d 979 (Sup. Ct. of Nevada, 1939), evidence based on physical examination admitted against defendant; *Fletcher v. U.S.*, 49 A. 2d 88

(Mun. Ct. of App., D.C., 1946), defendant gave urine specimen after officer told him it might help him; *Davis v. State*, 57 A. 2d 289 (Ct. of App. of Maryland, 1948), accused's blood was taken without disclosing real purpose and defendant convicted on evidence based thereon; *Commonwealth v. Statti*, 73 A. 2d 688 (Sup. Ct. of Penn., 1950), defendant's blood taken without his consent and used against him to show blood type; *State v. Sturtevant*, 70 A. 2d 909 (Sup. Ct. of New Hampshire, 1950), defendant's blood taken before he was in a condition to give consent; *State v. Nutt*, 65 N.E. 2d 675 (Ohio Ct. of App., 1946), Chief of Police allowed to testify that defendant refused to take urine-alcohol test.

Our own Court of Criminal Appeals of Texas has held that evidence consisting of rings removed from the accused's bowels by use of an enema, against the will of the accused and by force, is admissible in evidence against him. *Ash v. State*, 141 S.W. 2d 341 (Ct. Crim. App. of Texas, 1940).

Appellant relies heavily on the case of *Apodaca v. State*, 176 S.W. 2d 381 (1940), in which the Appellant was forced to walk fast, make sudden turns, stretch his arms out, put his finger on his nose, *answer questions*, and void the urine for analysis. The court held that testimony by an officer that he had reached the conclusion, from these tests, that defendant was intoxicated, was inadmissible as a violation of Article 1, Sec. 10 of the Constitution of the State of Texas. The court in this case based its opinion on all of the tests given including the testimonial compulsion employed in forcing the accused to answer certain questions and in reducing such

answers to writing. There was no reason for the court to draw the distinction between real and testimonial evidence in this case because both had been extracted from the accused by force and without his consent and therefore the presence of the testimonial compulsion in these tests made by the officers rendered the entire group of tests a violation of the accused's privilege against self-incrimination. All of the tests, both those involving testimonial evidence and those involving real evidence were used by the officer in reaching the conclusion that the accused was intoxicated, and therefore all of this evidence had to be excluded. The *Apodaca* case is easily distinguished from the case here in question on the above described basis in that our case involves only real, physical evidence while the Apodaca case involves both real and testimonial evidence. This distinction is not altogether necessary, however, in view of the fact that the *Apodaca* case has, in effect, been overruled by the case of *McKay v. State*, 235 S.W. 2d 173 (Texas Crim. App., 1950), as interpreted by the opinion of the Court of Criminal Appeals of Texas in the present case. We quote from that opinion:

> "The Apodaca opinion enumerates the tests through which the accused was forced to go, such as walking fast, making sudden turns, stretching his arms out and putting his finger on his nose, *answering questions*, together with having to void the urine for analysis. In holding this to be reversible error, the very logical opinion overlooked making any distinction between the last named requirement and those which caused

> him to perform acts which may be used to support opinions of his condition. The entire evidence was held to be improper. Had there been any point in discussing the difference, in all probability the distinguished Judge Christian, who wrote that opinion, would have followed the reasoning which the Court followed in the Ash case (cited above) and in Holloway v. State, 175 S.W. 2d 258."

The *Apodaca* case has been criticized in opinions in other states including *State v. Alexander* (cited ante p. 12).

Petitioner cites *Bram v. U.S.*, 168 U.S. 532, as authority for the proposition that a confession is not admissible if there is any hope or other inducement.

This was a murder case where a witness claimed he saw the defendant kill deceased. When an officer confronted defendant with this statement by the witness, defendant replied: "He could not have seen me from there." The Court held that this was used as a confession although made in the form of a denial and that it could not have been voluntary but was the resoult of hope, fear or both operating on the mind. (See p. 562, 2nd full paragraph.)

The case involves a testimonial statement in the form of an exculpatory remark used as a confession. It does not involve the taking of a bodily substance and is distinguished on that ground. There being no question of real vs. testimonial evidence, the case is not in point and will be discussed no further.

Appellant cites Judge Davidson's opinion in *Wharton v. State*, 152 S.W. 1082, but fails to mention that

Davidson's is the dissenting opinion in that case. The defendant made the statement to an officer (although defendant did not know he was an officer at the time) that he was not in town when the forged check was passed. This was later disproved and the State offered evidence of the statement to show that defendant lied about it and he therefore is probably guilty. The majority held that the defendant's statement was exculpatory and in no sense a confession of guilt, therefore it would not fall within the rule governing confessions and their admissibility.

The only question in this case was whether or not defendant's statement was a confession so as to fall within the statute, and there was no question as to its admissibility under Amendment Five of the U.S. Constitution. Here also there was involved an oral confession, if it was a confession in fact, and our case involves real evidence in body substance.

It does not concern the question of whether or not the signing of the statement was voluntary since it attempted to determine only whether or not this was a confession.

Appellant quotes some language from Judge Roberts' opinion in *Duncan v. Magette*, 25 Tex. 245, about the necessity of frequent recurrence to the first principles, etc.

This case and this language has nothing to do with our case because this was a civil case involving a question of set-off and there was nothing in it concerning confessions, the 5th Amendment or anything connected therewith.

Appellant cites *United States v. Jasper White*, 322 U.S. 694. (P. 40, App. Brief) which was a case in-

volving the question of whether or not the privilege against self-incrimination extends to unincorporated labor unions or whether it is a personal privilege applying only to individuals. There again there is no question of whether bodily substance is privileged under Amendment 5 and there again is involved testimonial or written records rather than real evidence in the form of bodily substance. Appellant misquotes the case on page 40 of his brief. It would be a correct quote if in the 3rd line from the bottom of the page the words "*accused individual*" were stricken and in their place the words "use of legal process to force from the lips of the accused the evidence necessary to convict him."

Further in the same quoted paragraph the Court says:

> "[The privilege] protects the individual from any disclosure, in the *form of oral testimony* or *chattels*, sought by legal process against him *as a witness.*" (Emphasis ours).

RESPONDENT'S COUNTER POINT THREE
(Restated)

The rule against self-incrimination is for protection of the individual and hence may be waived by him either by direct action or failure to act and the defendant waived such right in this case.

Argument and Authorities

The proposition that the privilege against self-incrimination may be waived is so fundamental and

well recognized both by writers and by the courts that only a brief discussion of that point will be attempted here.

The proposition is aptly set out in *Wigmore on Evidence*, Vol. VIII, 3rd Ed. Sec. 2275, where he says:

> "It has never been doubted that the privilege like all privileges, is in itself waivable."

Wigmore could discover only one case where the above was questioned.

The case of *U.S. v. Shaw*, 33 F. Supp. 531 (D.C. Cal. 1940), states:

> "The rule against self-incrimination is for protection of the individual and hence may be waived by him, either by direct action or by failure to act."

The record in this case discloses that defendant took the intoximeter test here involved, voluntarily, and as a result of no compulsion either by physical force or moral force; nor was he furnished a ground of hope which could be construed as compulsion.

The testimony of officer B. C. Garrison (R 56-138) the officer who took the signed release from defendant and warned him of his constitutional rights, and conducted the intoximeter test, shows that he read the following statement, which was State's Exhibit One, to the accused and asked him if he wanted to sign it:

"INTOXIMETER NO. 925

"Having been arrested and charged with having been found intoxicated in a public place, I hereby voluntarily authorize B. C. Garrison to whom this statement is made, to question me and make a test or tests for drunkenness, and I further declare that before such questions were asked and before such tests were made, that the above named person warned me that I did not have to make any statement at all, that I did not have to answer any questions, and that I did not have to take any sort of a test for drunkenness. But that if I did make such statement or take any test or tests for drunkenness, that any statements, answers or results of such a test or tests so made might be used in evidence against me upon the trial of the above offenses or upon the trial of any offense in which such tests or statements may be material in any manner, and I further certify that no promise, inducement, representation or persuasion or violence, physical or mental, has been made or used by any person causing me to make the above statement, or to waive any right, privilege or immunity that I have. Signed W. B. Jones, 1104 South Marlborough. Signed B. C. Garrison, 10-11-51. Investigation DWI and Investigation DWLic Suspended. Intoximeter No. 925, 27 Sec ps 3:25 p.m."

The accused voluntarily signed the above statement and there is no evidence anywhere in the record which would indicate that any force, duress, or ground of hope was used to encourage the accused to sign the statement or take the test. The officer simply asked defendant if he wanted to take the test and defendant agreed to do so.

Without in any way receding from the positions heretofore taken in this brief we respectfully point out that the statement signed by the Petitioner is entirely in accord with the Texas 'confession' statute.. The Texas Confession Statute is as follows:

> 'Art. 727. 810, 790 When confession shall not be used
>
> The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness.'

It will be noted that the statment signed by the Petitioner meets every requirement of the above quoted Article, C.C.P. 727.

Petitioner raises the point that if the State proves that accused was intoxicated they are at the same time proving he did not have the legal capacity to waive his privilege by signing the statement.

We refer to the case of *Holloway v. State*, 175 S.W. 2d 258 (Tex. Crim. App., 1943), in which case the accused contended that if he was intoxicated when he agreed to give the specimen of his urine it was not a voluntary act on his part. The court held that the defendant must show that he was so intoxicated as to be incapable of understanding the officer's warning as to his rights.

In the present case it should be noted that defendant does not claim that he was so intoxicated as to be incapable of understanding the warning but rather, *IF* he was intoxicated he could not have done the act voluntarily.

A thorough search of the record in this case discloses no indication that the defendant here was not capable of understanding the warning given by officers Garrison. Indeed, there is testimony (R 139) to the effect that officer Garrison asked the defendant if he understood the instrument he signed and that defendant did understand it.

The record makes it clear in this case that defendant signed the statement, and took the intoximeter test voluntarily and through no compulsion of any kind. He thereby waived any rights he might have had under the Fifth Amendment.

Appellant cites *U.S. v. Kallas*, 272 Fed. Rep. 742. In this case, the defendant was questioned without first having been advised that he was not compelled to answer and that the statements which he made might be used against him. The only question in the case was whether this could be used as a confession under Amendment Five without so advising the defendant beforehand. In our case the defendant was advised and signed a release. Here again there was involved testimonial evidence while in our case there was real evidence.

U.S. v. Bell, 81 Fed. 830, also is a case of testimonial confession without prior warning. It was also cited in Appellant's brief.

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court, and that the petition for writ of certiorari should be denied.

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APPENDIX

Amendment 5 of the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

13

SEP 8 1953
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

NO. [redacted]88

WALTER BRYSON JONES, *Petitioner*

VS.

THE STATE OF TEXAS, *Respondent*

PETITIONER'S SUPPLEMENTAL BRIEF AND REPLY TO RESPONDENT'S COUNTER POINTS

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IN THE

Supreme Court of the United States

NO. 824

WALTER BRYSON JONES, *Petitioner*

VS.

THE STATE OF TEXAS, *Respondent*

PETITIONER'S SUPPLEMENTAL BRIEF AND REPLY TO RESPONDENT'S COUNTER POINTS

PRELIMINARY STATEMENT

Petitioner, Walter Bryson Jones, was indicted by the Dallas County Grand Jury on the 29th day of October, 1951, for the offense of Driving a Motor Vehicle Upon A Public Highway While Intoxicated, Subsequent Offense; the case was tried to a jury on February 26th, 1952, which returned a verdict of Guilty, with the punishment set at one (1) year and one (1) day in jail. The Trial Court judgment was affirmed by the Court of Criminal Appeals at Austin, Texas, on December 3, 1952, this Hon-

orable Supreme Court Clerk docketed Petitioner's application for Writ of Certiorai on May 22, 1953, bearing Docket Number 824. The Brief of Respondent in Opposition to Petition for Writ of Certiorari was filed by John Ben Sheppard, Attorney General of Texas, by and through his Assistants, Mr. John Davenport and Mr. David Beerbower.

STATEMENT OF THE CASE

Petitioner Walter Bryson Jones contends that he was deprived of his rights guaranteed him by the privilege against self-incrimination contained in the Fifth Amendment to the Constitution of the United States by the admission of evidence concerning a Confession and/or Statement together with Conversation testified to by Police Officer Garrison.

RESPONDENT'S COUNTER POINT NUMBER ONE
(Restated)

Exemption from compulsory self-incrimination in the state courts is not secured by the Fifth Amendment or any part of the Federal Constitution.

Respondent cites the case of *Twinning vs. New Jersey*, 211 U. S. 78, stating the opinion written by Mr. Justice Moody, wherein he said:

> "The privilege was not included in the Federal Constitution as originally adopted, but was placed in one of the ten Amendments which were recommended to

the States by the First Congress, an by them adopted. Since then all the states of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their Constitutions except the States of Iowa and New Jersey . . . It is obvious from this short statement that it has been supposed by the states that, so far as the state courts are concerned, the privilege has its origin in the Constitution and laws of the states, and that persons appealing to it must look to the state for their protection. . . ."

Respondent cites the case of *Snyder vs. Massachusetts*, 291 U.S. 97 (1933):

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our pople as to be ranked as fundamental."

Respondent cites the case of *Polk vs. Connecticut*, 302 U.S. 319 (1937):

> "The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it."

Respondent also cites the case of *Adamson vs. California*, 332 U.S. 46-53 (1946):

> "It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship."

Respondent contends that Petitioner's appeal to this Honorable Court should be denied because, "Exemption from compulsory self incrimination in the state courts is not secured by the Fifth Amendment or any part of the Federal Constitution", and his contention is borne out by the heretofore cited cases. However, Respondent overlooked the most recent law (statute) in Texas, which is as follows:

VERNON'S TEXAS SESSION LAW SERVICE
53RD LEGISLATURE - REGULAR SESSION LAWS
1953 - MAY 22ND - JUNE 4TH, 1953
CHAPTERS 196-285; PAGE 669,
CRIMINAL LAW PROCEDURE - EVIDENCE,
CHAPTER 253
SENATE BILL NUMBER 127

An act amending Article 727a, Code of Criminal Procedure of this State, to include reference to the laws of the United States, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1 That Article 727a, of the Code of Criminal Procedure of the State of Texas be and the same is hereby amended so as to hereafter read as follows:

"NO EVIDENCE OBTAINED BY AN OFFICER OR OTHER PERSON IN VIOLATION OF *Article 727a*

ANY PROVISION OF THE CONSTITUTION OR LAWS OF THE UNITED STATE OR OF THIS STATE SHALL BE ADMITTED IN EVIDENCE AGAINST THE ACCUSED ON THE TRIAL OF ANY CRIMINAL CASE."

Section 2. The facts that the present law authorizes evidence obtained in violation of the laws of the United States to be used in evidence against the Accused upon trial for a violation of the laws of this State, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be and the same is hereby suspended; and that this Act shall take effect and be in force from and after its passage, and it is so enacted. Passed the Senate, April 30, 1953; Yeas 30, Nays 0; Passed the House May 26, 1953; Yeas 120, Nays 0. Approved June 4, 1953, effective June 4, 1953.

Respondent, in his Brief on page 25, recites said Statute, but fails to include the hereinbefore quoted Legislative Enactment which is now the law in Texas.

Petitioner humbly submits to this Honorable Court that Respondent's Counter Point Number One is not well taken and should be held for naught.

RESPONDENT'S COUNTER POINT NUMBER TWO
(Restated)

Petitioner was not deprived of his constitutional rights in that the constitutional guarantee contained in the Fifth Amendment against self-incrimination applies only to "testimonial evidence elicited from the defendant, and not to his body, nor substance taken therefrom, as evidence."

Petitioner agrees with Respondent that "there is a sharp line of distinction between the cases where Defendant is compelled to give testimonial evidence against himself in the form of aswering questions or producing papers which will tend to incriminate him and the cases involving the compulsory production or surrender of real or objective evidence. (See annotation in 127 A.L.R. 2d 1408-1409, 22 Corpus Juris Secundum 998, and pocket part.)

"The proposition is aptly set out in Wigmore on Evidence, Vol. VIII, 3rd Ed. 2263, where he says:

> "Looking back at the history of the privilege and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place o fother evidence. Such was the process of the ecclesiastical court, as opposed through two centuries' . . ."

Respondent cites the case of *Holt vs. United States*, 218 U.S. 246, wherein Mr. Justice Holmes said:

> "But the prohibition of compelling a man in a criminal court to be a witness against himself is a pro-

> hibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material . . ."

Respondent also cites among other cases the case of *McFarland vs. United States*, 150F 2nd 593, wherein the Court said:

> "We think the evidence was admissible. 'The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence'."

Respondent, in his Brief cities many cases which recognize the distinction between real and testimonial evidence. He continues to contend that the case of this Petitioner and that our point is the taking of the breath (real-evidence) and not testimonial evidence.

Petitioner calls this Honorable Court's attention to the quoted Statement on page 24 of Respondent's Brief, wherein the Petitioner speaks, which is testimonial evidence. The word "*I*" is used EIGHT (8) times in said statement and the word "*ME*" is used FOUR times. This is testimonial evidence, the Petitioner SPEAKING. We quote from Webster's New International Dictionary of the English Language, Second Edition, Unabridged Volume Two (2), Page 1232, published by G & C Merriman Company, Publishers, Springfield, Massachusetts, USA 1947, wherein the words "*I*" and "*ME*" are discussed and defined as follows:

"The pronoun I regarded as a word or represented as a person; as, his incessant I, I, I,; another I; a second self; specif.; Metaph., the ego; as, this I that thinks is the soul."

"MY FATHER HATH NO CHILD BUT I."
—Shakespeare.

"IT IS I; BE NOT AFRAID". MARK 6:60.

"HOW MAY I THESE "I'S" UNITE?"
—S. V. Bennett

"The nominative case of the pronoun of the first person; the subject pronoun by which a speaker or writer *denotes himself:* as, "I SHOULDN'T IF I WERE YOU.

"The nominative plural ending of Latin 2nd declension masculine: as, "FOCI, RADII, ALUMNI.

"As a symbol it is used to denote or indicate *ANYONE* or ANYTHING CONVENIENTLY SO DESIGNATED, ESPECIALLY, AS THE NINTH IN ORDER OR CLASS."

Quoting from Page 1518 of the hereinbefore cited Webster's Dictionary, the definition of the word "*ME*":

"As the ethical dative, *designating the speaker as interested or concerned*: - Especially in Elizabethan usage, as,

"HE STEPS ME TO HER TRENCHER."
—Shakespeare.

"WOE IS ME."

"ME WERE LIEF."

"THOU SHALT HAVE NO OTHER GODS BEFORE ME." EX. 20:3.

> "The use of "*ME*" for "*I*", as after the conjunctions "As" and "Than", and as a predicate substantive (as, "IT IS ME:" CF. F. C.' EST MOI), although avoided in formal writing and by precise speakers is frequent in colloquial and dialectical speech.'
>
> "BUT STILL KEEP THE INMOST ME BEHIND ITS VEIL."—Hawthorne.

Petitioner submits that because of the foregoing legal and accepted meaning of the word "*I*" and "*ME*" that the evidence admitted over objection was testimonial evidence and that the his rights and privileges guaranteed by the Fifth Amendment were violated.

Petitioner further calls this Honorable Court's attention to the fact that the record objection shows that this instrument on page 24 of Respondent's Brief at the bottom stated as follows:

> "Investigation DWI and Investigation DWLic Suspended. Intoximeter No. 925, 27 Sec. ps. 3:25 p.m."

was written on said instrument by Officer Garrison and said statement was prejudicial and was evidence of a distinct and separate criminal offense for which the Petitioner was not on trial for.

Petitioner humbly submits to this Honorable Court that Responent's Counter Point Number Two is not well taken and should be held for naught.

RESPONDENT'S COUNTER POINT NUMBER THREE

(Restated)

The rule against self-incrimination is for protection of the individual and hence may be waived by him either by direct action or failure to act and the defenant waived such right in this case.

Petitioner herewith quotes from the case of *United States vs. Shaw*, 33 F. Sup. 531 (D.C. Cal. 1940), which Respondent cites concerning waiver of privilege of self-incrimination:

1. Criminal Law Key 393 (1)

"The rule against self-incrimination is for protection of the individual and hence may be waived by him, either by direct action or failure to act. U.S. Const. Amend. 5."

Judge Yankwich says:

"The rule against self-incrimination in the Fifth Amendment to the Constitution of the United States is one of the great fundamentals of our constitutional liberty. Its enactment is traceable to the experiences of ages past when convictions were secured upon confessions extracted by barbarous methods. This privilege, like all others, is a shield made for the protection of the individual against arbitrary acts of those charged with the enforcement of the law."

2. "Despite certain general statements in older cases to the contrary, the accepted view now sanc-

> tioned by the Supreme Court is that a waiver takes place when the Defendant, *who is not under compulsion, stands* silent and does not claim the privilege."

This case cited by Respondent in his Brief was one wherein the Defendant was represented by counsel, at the time of his appearance before a commission hearing, he received a warning and took the stand and testified. At the bottom of page 532 of this case (33 Fed. Sup. 532), the Honorable Court said:

> "Nowhere is it averred that Shaw raised the Plea of self-incrimination or claimed immunity by reason of it."

AUTHORITIES

Powers vs. United States, 223 U. S. 303;

United States vs. Com., 273 U. S. 103;

United States vs. Murdock, 284 U. S. 141;

United States vs. Skinner, 218 Federal 870;

Johnson vs. United States, 5 Federal 2, 471;

United States vs. Lay Fish Company, 13 Federal 2, 471;

United States Greater New York Chamber of Commerce, 32 Federal 2, 1005;

Wigmore on Evidence, Volume 8, 3d Ed. Sec. 2275.

> "It has never been doubted that the privilege like all privileges, is itself waivable."

Quoting from page 551 of the hereinbefore cited Webster's International Dictionary, the definition of the word *"COMPULSION"*:

> "An impulse or feeling of being irresistably driven toward the performance of some action which is irrational. Force, coercion. An act of driving or urging by force or by physical or moral constraint. State of being compelled."

Quoting from page 544 of the hereinbefore cited Webster's International Dictionary, the definition of the word *"COMPEL"*:

> "To drive or urge with force; to constrain; oblige; necessitate, whether by physical or moral force; *to exert an irresistable influence.* Require, coerce, drive; instigate, urge, incite, influence, actuate.
>
> *"COMPEL"* and *"IMPEL"* agree in the idea of urging to action. *"Compel"* implies (frequently as if from without) of irresistable physical or moral force or constraint; *"Impel"* suggests rather such influence (usually exerted upon the mind) as "incites or induces to action".

Quoting from page 572 of the hereinbefore cited Webster's International Dictionary, the definition of the word *"CONSTRAIN"*:

> "To compel; necessitate; oblige; to secure by bonds, to chain, bind, or confine. When winter frosts constrain the fields with cold. Dryden; drive, impel, urge, press, curb, check; to prevent the occurrence of (motion) except in a particular manner. To prevent the operation, especially the motion, of (a material

point or body) except in a particular and definite manner."

"CONSTRAINT":

"Exercise of control over one's feelings or behavior whether by simulation or repression (the unconscious process by which a desire or impulse unacceptable to one's ego is excluded from conscious admission and prevented from being directed to its specific goal and object and, thus denied direct satisfaction is left to operate in the unconscious)."

Petitioner cites from Southern California Law Review, Volume 9, Number 1, November 1935, page 14, wherein Judge Leon R. Yankwich, Judge of the District Court of the United States states:

"Justice as a function of a whole society—aiming to give expression to the highest social ideals in attempting to achieve it. It would therefore submit its administration to the same rules of forthright conduct and decency of behavior which it applies to other individuals. Behind it is the idea expressed elsewhere by Mr. Justice Oliver Wendell Holmes that law is

> 'a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.'" — (Holmes, Collected Papers (1921), 129, 130.)

"The rule of supremacy of law is so fundamental a characteristic of the legal system of the English-speaking world that it should not seem necessary to emphasize its meaning. And yet when you find judges, like Lord Chief Justice Scroggs, asserting a theory

of justice which would disregard this principle, and find many today asserting that our constitutional fundamentals should not apply to those coming in conflict with the law, it needs be reasserted - in the language of the old law reports - that

> 'La ley est le plus haute inheritance, que le roy ad; car par la ley il meme et toutes ses sujects sont rules, et si la ley ne fuit, nul roi, et nul inheritance sera. (The law is the highest inheritance which the King has, for by law he and all his subjects are governed and if there were no law there would be no King and no inheritance.)" Y. B. 19 Hen. 6.

In *The People vs. Mayen*, 188 Cal. 237-253, 205 Pac. 435, the Supreme Court stated:

> "This means, as we understand it, that one charged with the commission of a crime has the right at all stages of the investigation to stand silent and inert before his accusers. If he is required to contribute by *WORD* or *ACT* to the evidence against himself, his constitutional right is invaded."

In the *People vs. Simsen*, 153 Cal. 387, 394, 95 Pac. 863, 866, 69 Pac. 487 (1902), the Court stated:

> "The slightest pressure, whether by way of inducement to confess, or threat if confession is withheld, is sufficient to require the exclusion of the confession."

In *Gluck vs. the State of Florida*, 62 SW 2d 71, the Honorable Justice Glenn Terrell said:

> "The Founding Fathers were so committed to the necessity of the Bill of Rights to free government that they refused to approve the Federal Constitution

absent a compact to annex or to that instrument. It has been defined as A DECLARATION OF INDIVIDUAL RIGHTS RESERVED IN THE CHARTER OF GOVERNMENT TO SAFEGUARD THE WELFARE OF FREE PEOPLE. The Imperatives of the Bill of Rights are relative, not absolute; they defy concise definition but they are flexible enough to meet the complexities of changing circumstances. They are nevertheless considered essential to a democratic republic that recognizes no absolute, unbridled arbitrary power over the life, liberty, or property of the people.

"Man's inhumanity to his fellow man may not be confined to countries behind the Iron Curtain where the law is tested in terms of its effect on the state. Democracy, to the contrary, places the emphasis on the individual and tests the law in terms of its effect on him. Tested in this manner, it becomes a guide to correct habit patterns, rather than a straight jacket to tether the individual to the caprice of the Gestapo or Gendarme.

> " I PREFER HAVING MY CIVIL AND POLITICAL RIGHTS ADMINISTERED BY THE BILL OF RIGHTS CLOTHED WITH DUE PROCESS RATHER THAN BY ANY TOTALITARIAN PATTERN.

"Fair and orderly administration of justice is the surest way to strengthen and perpetuate democratic processes. The Bill of Rights points the way to do this. No alternative to it has yet been devised but the Totalitarian process. It is not difficult to fall into that if we permit passion and impulse, instead of discretion and reason, to lead us.

> "About the turn of the century, Thomas R. Marshall quipped that the thing this country needs is a good five-cent cigar. If he were to speak to us now, great American that he was, the recent charges and disclosures of Communists lurking about Washington in some of the institutions of high learning and elsewhere about the country, he would no doubt be prompted to say that the thing this country most needs is a baptism in the Bill of Rights."

PETITIONER SUBMITS THAT HE COULD NOT AND DID NOT WAIVE HIS CONSTITUTIONAL RIGHTS.

Petitioner humbly submits to this Honorable Court that Respondent's Counter Point Number Three is not well taken and should be held for naught.

CONCLUSION

WHEREFORE, your Petitioner prays that a writ of certiorari be issued unde rthe seal of this Court, directed to the Court of Criminal Appeals of Texas, to the end that this cause may be reviewed and determined by this Court; and that the judgment of said Court of Criminal Appeals be reversed by this Court, and for such other relief as the Court may deem proper.

Respectfully submitted,

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